

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY STITH,

Plaintiff,

vs.

HARREL WATTS, et al.,

Defendants.

CV F 05 0023 AWI WMW P

ORDER RE: FINDINGS &
RECOMMENDATIONS (#37)

ORDER GRANTING MOTION
TO DISMISS (#26)

Plaintiff is a state prisoner proceeding pro se in this civil rights action. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72-302.

On September 18, 2006, Findings and Recommendations were entered, recommending Defendants' motion to dismiss be granted and the court dismiss this action for failure to state a claim upon which relief can be granted. Plaintiff was provided an opportunity to file objections within ten days. Plaintiff has not filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(B) and Local Rule 73-305, this court has conducted a de novo review of this case. Having carefully reviewed the

entire file, the court finds the findings and recommendations to be supported by the record and proper analysis. The complaint fails to allege sufficient facts to state a claim. However, it appears the court has never given Plaintiff the opportunity to amend his complaint. Generally, a court must give a pro se incarcerated inmate notice of the complaint's pleading deficiencies prior to dismissal of an action. See Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) (if court determines that complaint fails to state claim, leave to amend may be granted to extent that complaint's deficiencies can be cured); Noll v. Carlson, 809 F. 2d 1446, 1448 (9th Cir. 1987) (prisoner must be given notice of deficiencies and opportunity to amend prior to dismissing for failure to state a claim). Further, when dismissing a complaint, the Ninth Circuit has stated that "leave to amend should be granted unless the district court determines that the pleading could not possibly be cured by the allegation of other facts." Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir.2001) (internal quotation marks omitted); Chang v. Chen, 80 F.3d 1293, 1296 (9th Cir. (9th Cir. 1996). Here, the court cannot find that it would be impossible for Plaintiff to allege additional facts that would state a claim. As such, the court will dismiss the complaint with leave to amend.

Plaintiff is advised that any amended complaint that includes such claims must be based upon a well-founded belief that a cognizable or arguable legal theory exists that would support such a theory. Plaintiff must demonstrate how the conditions complained of have resulted in a deprivation of Plaintiff's federal constitutional rights. Plaintiff must allege in specific terms how each named defendant is involved. In addition, Plaintiff is informed that the court cannot refer to a prior pleading in order to make Plaintiff's amended complaint complete. Local Rule 15-220 requires that an amended complaint be complete in itself without reference to any prior pleading. This is because, as a general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Therefore, in an amended complaint, as in an original complaint, each claim and the involvement of each defendant must

1 be sufficiently alleged.

2 Accordingly, THE COURT HEREBY ORDERS that:

3 1. The Findings and Recommendations issued by the Magistrate Judge on
4 September 18, 2006, are adopted in full;

5 2. Defendants' motion to dismiss is GRANTED;

6 3. The complaint is DISMISSED with leave to amend;

7 4. Plaintiff shall file any amended complaint within thirty days of this order's
8 date of service. Any amended complaint shall contain the case number for this action and be
9 captioned "Amended Complaint."

10 5. Plaintiff is forewarned that failure to file an amended complaint will result in
11 this action's dismissal.

12
13 IT IS SO ORDERED.

14 **Dated: October 3, 2006**
15 0m8i78

/s/ Anthony W. Ishii
UNITED STATES DISTRICT JUDGE